IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 43.

LESTER J. ALBRECHT.
Petitioner,

v.

THE HERALD COMPANY, a Corporation, d/b/a GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

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INDEX.

Cases Cited.

Statutes Cited.

Rules Cited.

Textbooks Cited.

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BRIEF FOR RESPONDENT.

STATEMENT OF FACTS.

A. The Facts.

This is a treble damage action for alleged violation of § 1 of the Sherman Act, brought by the petitioner, Albrecht, a retail newspaper dealer, against the respondent, the publisher of the St. Louis Globe-Democrat, a daily and week-end newspaper (R. 1).

Under the statement of policy unilaterally announced by the publisher, a dealer like Albrecht was given a terri-

tory within which to make home-delivery sales, which was to be

> "maintained exclusively to him . . . so long as the price at which such sales are made in his territory shall not be higher than the price therefor suggested by the publisher" (R. 60).

Albrecht testified: "Never had I agreed to that statement of policy" (R. 61).

Albrecht insisted on overcharging and respondent commenced competing with him in his territory by soliciting sales and selling at the suggested price (R. 8, 9), all the while selling such newspapers to Albrecht as he requested at the previous wholesale rate. Respondent employed Milne Circulation Sales, Inc., its normal circulation sales agent, to solicit subscribers in the Albrecht territory at the suggested price (R. 61, et seq.). By early July, 1964, respondent had acquired a customer list in the same territory of three hundred-some customers (R. 75). These were turned over for servicing to another carrier, George Kroner, during the latter part of July (R. 78). Kroner never did solicit anybody for sales in this territory (R. 79).

On August 12th Albrecht filed this suit (R. 139). Respondent then notified him that it would cease selling him wholesale newspapers after sixty days (R. 48), but would permit him to sell his route during that period (R. 48). At his request it extended the sixty-day limit an additional ten days (R. 49). Albrecht sold the route at a profit of $1,000 (R. 22, Br. 11).

All of the testimony was put on by petitioner. After the evidence was all in, petitioner amended his complaint in the particulars set out in part B of this statement. The cause was submitted to a jury, which found for the respondent (R. 142). The Court of Appeals affirmed—367 F. 2d 517, R. 145, et seq.

B. The Complaint.

Petitioner's original complaint was in two counts, Count I for a common law tort of malicious business interference based upon diversity of citizenship and Count II for conspiracies and combinations, "accomplished and brought about by contracts, agreements and understandings" in violation of the Sherman Act (R. 7, et seq.).

Count I was dismissed just prior to trial (R. 141).*

Apart from the reincorporation of Count I by Paragraph 17, the Sherman Act Count originally read as follows:

> "18. During all of said times the Publisher has entered into contracts, agreements or understandings and has unlawfully conspired and combined with a person or persons engaged in the newspaper business pursuant to which the Publisher has fixed . . . prices . . .
>
> "19. Each and all of the aforesaid unlawful conspiracies and combinations entered into by and between the Publisher and a person or persons unknown to plaintiff were in restraint of the trade . . . and were accomplished and brought about by contracts, agreements and understandings between the Publisher and a person or persons unknown to plaintiff, and the acts done pursuant thereto were in violation of and contrary to Sections 1 and 2 of Title 15, U. S. C. A. . . ."

"At the close of all the evidence in the case and after a Motion for a Directed Verdict was filed by plaintiff, and during the time that the charge of the Court was being considered . . . the plaintiff filed a Motion to Amend his Complaint" (R. 109).

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* Nevertheless, echoes of the dismissed count still appear in petitioner's brief (Br. 15, top).

The amendment recites that it was made (R. 111), "In order to conform to the evidence." The amendment, which was permitted (R. 109), (a) substituted for the words "a person or persons unknown to plaintiff" and "third person or persons" wherever they appeared, the words "plaintiff's customers, and/or Milne Circulation Sales, Inc., and/or George Kroner," and (b) deleted the words "conspired", "colluded", "conspire", "conspiracies", "collusion" wherever they appeared (R. 110, 111).

Applying the amendment to the pleading gives the following present record complaint:

> "18. During all of said times the Publisher has entered into contracts, agreements or understandings and has unlawfully and [*sic*] combined with a person or persons engaged in the newspaper business pursuant to which the Publisher has fixed . . . prices . . .
>
> "19. Each and all of the aforesaid unlawful and [*sic*] combinations entered into by and between the Publisher and plaintiff's customers, and/or Milne Circulation Sales, Inc., and/or George Kroner were in restraint of the trade . . . and were accomplished and were brought about by contracts, agreements and understandings between the Publisher and plaintiff's customers, and/or Milne Circulation Sales, Inc., and/or George Kroner, and the acts done pursuant thereto were in violation of and contrary to Sections 1 and 2 of Title 15, U. S. C. A. . . ."

The colloquy at R. 110 (footnote 4, opinion R. 149) concerning the amendment is incomplete; and in the Court of Appeals, respondent filed a Supplemental Record (R. 143) showing the continuation of the colloquy as follows (R. 144):

> "Mr. Hocker: What are you going to do with the words 'contract, agreement or understanding' that

appear in Paragraphs 18 and 19? Are they deleted or left in?

"Mr. Siegel: They are left in. Apparently there is no evidence, I guess, of any illegal agreements or contracts, except if they are illegal by constituting a combination. That aspect remains in."

The dismissal of Count I and the amendment to the complaint were made months after the motion for summary judgment had been filed and ruled on (R. 139, 140, 141).

The Supplemental Complaint (R. 12) lodged December 10, 1964 (R. 139), filed February 12, 1965 (R. 140), both being after petitioner had "sold" his route (R. 12), merely added additional damages on account of respondent's actions since the filing of suit. It did not affect petitioner's pleaded theory of the case (R. 12, 13).

SUMMARY OF ARGUMENT.

I.

Petitioner's stated "Question Presented" is not before the Court, and the only relief he prays for cannot be granted; because this Court has no jurisdiction over the subject matter of the claim, nor jurisdicition to afford the relief prayed for. Jurisdiction is predicated solely upon 15 U. S. C. 15; and that statute having been enacted, and this action being brought in major part for punishment on account of the commission of a federal crime, the statute is unconstitutional, both in general, and particularly as applied in the circumstances of this case, under U. S. Constitution, Art. II, §§ 1, 2 and 3; Amendment IV; Amendment V, clauses 2, 3 and 14; Amendment VI; Amendment VII; and Amendment VIII. The statute, as applied, would deprive this defendant (it being threatened with punishment through governmental action for a criminal offense): of its right to prosecution only by the President of the United States or an officer commissioned by him, of its right to petition for executive clemency, of its right not to be searched except upon oath, of its right not to be twice put in jeopardy, of its right not to be compelled to witness against itself, of its right to jury trial, and of its right not to be subject to excessive fines or unusual punishment.

II.

Petitioner's stated "Question Presented" is not before the court, nor can the relief prayed for be granted; because the relief sought, that is, a judgment notwithstanding the jury's verdict exonerating defendant,

(a) is predicated in this court upon grounds not within the scope of his claim for relief nor of his motion for directed verdict in the trial court; and

(b) is predicated upon proof "as a matter of law" of seven antithetical and alternatively pleaded allegations; the proof of the truth of one being *ipso facto* proof of the untruth of the other six.

III.

Under the facts of this case, petitioner failed to show such a combination as that which he pleaded, after the close of all the evidence, by amendment to his complaint, that is, between respondent and "plaintiff's customers and/or Milne Circulation Sales, Inc., and/or George Kroner". More particularly, he did not prove any such combination "and/or" combinations *as a matter of law.*

Petitioner's assertion that a Sherman Act violation can be proved (and that it was here proved, as a matter of law), solely by showing coercion upon a customer (petitioner) by a seller (respondent) "not acting in agreement, concert or common purpose with anyone" is not the law. The statutory words "contract, combination in the form of trust or otherwise, or conspiracy" require that there be a common purpose, at the least, of two traders to restrain trade.

ARGUMENT.

I.

The Court Lacks Jurisdiction to Grant the Relief Sought.

In his brief, petitioner demands only the following specific relief in this Court:

> "Petitioner respectfully prays the Court to reverse the decision below and direct that judgment be entered for petitioner Albrecht on the matter of liability, and a trial be had on the amount of damages resulting from the unlawful solicitations and the unlawful termination." Pet. Br. 32.

But such an order as this, in a privately prosecuted action for the infliction of a statutory penalty (treble the damages found by the jury) for the commission of a federal crime, after the acquittal of the defendant by a jury in a previous trial of the same issues, is beyond the jurisdiction of this Court, because of the unconstitutionality of the statute conferring jurisdiction, under the following provisions of the United States Constitution:

Article II:

Sect. 1: "The executive power shall be vested in a President of the United States of America."

Sect 2: "The President . . . shall have power to grant reprieves and pardons for offenses against the United States."

Sect. 3: ". . . he shall take care that the laws be faithfully executed, and shall commission all officers of the United States."

Amendment IV:

". . . no warrant shall issue but upon probable cause, supported by oath and affirmation, and par-

ticularly describing the place to be searched and the person or thing to be seized."

Amendment V:

Cl. 2: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

Cl. 3: ". . . nor shall be compelled in any criminal case to be a witness against himself . . ."

Cl. 4: ". . . nor be deprived of life, liberty, or property, without due process of law . . ."

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . ."

Amendment VII:

". . . no fact tried by a jury shall be otherwise reexamined in any Court of the United States than according to the rules of common law."

Amendment VIII:

". . . nor [shall] excessive fines [be] imposed, nor cruel and unusual punishment inflicted."

Since respondent's argument in support of its assertion of no jurisdiction is available to the Court in the presently pending Respondent's Motion to Dismiss for Want of Jurisdiction, which we now incorporate into this brief by reference, we shall not repeat it here.

II.

The Errors Alleged as Grounds for Reversal Are Not Available to Petitioner on His Own Pleadings.

Petitioner's tendered Question Presented reads as follows (Petition, p. 2, Br. 2):

> "Whether as a matter of law a newspaper's actions of soliciting away the customers of one of its independent-merchant carriers in order to induce him to comply with its suggested resale price, and then terminating sales to him for his continued refusal to agree to comply are in violation of Sec. 1 of the Sherman Act."

The only relief asked by petitioner reads as follows (Br. 32):

> "Petitioner respectfully prays the Court to reverse the decision below and direct that judgment be entered for Petitioner Albrecht on the matter of liability, and a trial be had on the amount of damages resulting from the unlawful solicitations and the unlawful termination."

In this Court, therefore, petitioner, under Supreme Court Rule 40.1 (d) and (h), presents the single question of whether on the record made below he is entitled to judgment n. o. v. on liability.

It follows that all claimed procedural errors presented to the trial court or to the Court of Appeals are now abandoned, including the criticism of that portion of the charge to the jury which required a "common purpose" between defendant and its unidentified co-combinee. It is petitioner's entire position here that there was nothing for the jury to decide. Similarly, petitioner's motion for summary judgment is not before this Court, since it was based upon a complaint which was subsequently amended, not once, but twice. The question of his right to judgment on the abandoned complaint is simply moot.

Therefore, except for the claim for judgment n. o. v. on liability, the several assertions of error set out at the end of petitioner's Summary of Argument (Br. 13) are surplusage.

A. Petitioner's Brief, Sections III, IV, V.

The major thrust of petitioner's brief here (Sections III, IV and V) is that the combination shown to exist as a matter of law could and did "consist of the seller and his coerced customer", i.e., *Albrecht* (Br. 23). He coins the phrase "antagonistic-coercive relationship between buyer and seller", and treats such a relationship alone as enough to form a combination violative of 15 U. S. C. 1.

In the Summary of Argument he states his proposed rule as follows (Br. 13):

> "However, in retail price maintenance cases, an unlawful 'combination' can consist of an antagonistic-coercive relationship between the seller, not acting in agreement, concert or common purpose with anyone, and the buyer."

His "Question Presented" contains no hint of the existence of any contract, agreement, understanding, combination, coercion or of any participation by anyone other than the "newspaper" itself (Br. 2); and the relief he seeks (Br. 32) would allow recovery for damages caused not by any cooperative action, but by the respondent's unilateral solicitations and unilateral termination.

We will discuss this novel theory of the statute under part III; but on the pleadings on which *this* case was tried, the question is moot.

Reference to section B of our Statement of Facts shows that plaintiff's *pleaded* claim was predicated throughout,— from the filing of the suit until the verdict was rendered,— upon a combination of the defendant with:

(a) Some person or persons *other than plaintiff*, whose combination was

(b) Accomplished and brought about by contracts, agreements and understandings between defendant and the same person or persons.

(a) The complaint, until the last-moment amendment, alleged (conspiracy as well as) combination between the respondent and "a person or persons unknown to plaintiff" (R. 7). Of all the persons in the world the only one who could *not* have been "unknown to plaintiff" is the plaintiff himself. After the amendment, the combination was alleged to have been with "plaintiff's customers, and/or Milne Circulation Sales, Inc. and/or George Kroner". None of these could be the plaintiff, any more than could the "person unknown" or the "said third person or persons" (Par. 15, R. 5) of the original pleading.

(b) The allegations of Paragraph 18 of the complaint that "During all of said times the Publisher has entered into contracts, agreements and understandings" (R. 6), and those of Paragraph 19 that the actionable combinations were "accomplished and brought about by contracts, agreements and understandings between Publisher and plaintiff's customers and/or Milne Circulation Sales, Inc., and/or George Kroner," were deliberately retained. At the time the amendment was being considered respondent's counsel asked a question which petitioner's counsel answered as follows (R. 144):

> "Mr. Hocker: What are you going to do with the words 'contract, agreement or understanding' that appear in Paragraphs 18 and 19? Are they deleted or left in?
>
> "Mr. Siegel: They are left in. Apparently there is no evidence, I guess, of any illegal agreements or contracts, except if they are illegal by constituting a combination. That aspect remains in."

In his charge (R. 125) the Court, taking into account Mr. Siegel's statement as well as the amendment, withdrew from the jury's consideration the allegations of conspiracy and collusion, and the allegation of contracts or agreements as illegal *per se*, and the allegation that *con-*

spiracies were accomplished and brought about by illegal contracts or agreements. Petitioner made no objection to this portion of the charge (R. 112).

Applying this interpretation to the amendment, we have left the allegation that the *combinations* were accomplished and brought about by contracts, agreements and understanding between respondent and the alternatively pleaded co-combinees, "plaintiff's customers, and/or Milne Circulation Sales, Inc., and/or George Kroner".

It follows that petitioner's proposition:

> "that an unlawful combination can consist of the seller and his coerced customer..." (Br. 22).

is just not within the scope of his pleadings in this case. This was not—and, indeed, is antithetical to,—the predicate of petitioner's claim for relief before the trial court, and hence cannot be the basis of a judgment n. o. v. in this Court.

> Gilby v. Travelers, 248 F. 2d 794;
> Fanchon & Marco, Inc. v. Paramount Pictures, 215 F. 2d 167 (cert. den.), 348 U. S. 912, 75 S. Ct. 293.

As the Court of Appeals held (R. 156):

> "This was the plaintiff's theory of the case and the only basis of recovery upon which the case was tried and upon which plaintiff's counsel argued to the jury."

The question of whether a Sherman Act combination can consist only of a "seller not acting in agreement, concert or common purpose with anyone and the buyer" (Br. 13) may be an interesting one; but the question, on this record, does not present the case or controversy upon which Federal jurisdiction must depend under U. S. Const., Art. III, Sec. 2. It was simply not pleaded below.

B. Petitioner's Brief, Sections I and II.

It follows that, on the record he made below, petitioner may only show here what he undertook to show below (R. 158, footnote) and what he seeks to show here in Sections I and II of his brief "as a matter of law": that there was a combination between respondent and "plaintiff's customers and/or Milne Circulation Sales, Inc., and/or George Kroner".

But this, by the very nature of the allegation, he cannot do. Even though this allegation is not "fairly comprised" in petitioner's question Presented, (Rule 40 (d), we will discuss the evidence on this issue under part III of this brief. For the purpose of this point, we wish only to demonstrate that such an allegation as this could never support a directed verdict.

The disjunctive "or", by definition, postulates alternatives. Petitioner's pleading submits alternatives thus: The co-combinee was "plaintiff's customers" (but not Milne or Kroner), *or* Milne (but not the customers or Kroner) *or* Kroner (but not the customers or Milne) *or* the customers plus Milne (but not Kroner), etc., etc. Plaintiff had 1201 customers (R. 38). Just taking the "customers" allegation as an integer, there are seven possible alternative combinations pleaded: a, b, c, ab, ac, bc, or abc.

In Moore Federal Practice, 2d Ed., Vol. 2-a, pages 1888, 1889, 1890, the author has said:

> "Alternative or hypothetical pleading by its nature is inconsistent. This, however, is not a valid objection to it under Rule 8 e . . .
>
> * * * * * * *
>
> "The inconsistency may lie either in the statement of the facts or in the legal theories adopted, and the party will not be required to elect upon which legal

> theory he will proceed since this would defeat the whole purpose of allowing any inconsistent pleading."

Thus, alternative pleadings and even alternative submissions are permissible under Rule 8 e 2, F. R. C. P.; because a given set of proved facts may support one or more hypothetical findings by the trier of the facts, where reasonable minds can differ as to the conclusion to be drawn from the facts. Cf. Form 10, F. R. C. P.

But the very hypothesis of an alternative pleading,—that reasonable minds can differ,—excludes the only predicate of a directed verdict,—that reasonable minds cannot differ. Muldrow v. Daly, 329 F. 2d 886; Nelson v. Brames, 253 F. 2d 381.

It follows that the purpose of the alternative pleading rule is subserved by the alternative submission to the jury, as the finder of the ultimate fact. The rule has no application to a motion for a directed verdict or for judgment n. o. v.

The proof of this is that Rule 50 (b), F. R. C. P., requires that:

> "A motion for directed verdict shall state the specific grounds therefor."

This requirement, say the courts, is *mandatory.* Budge Mfg. Co. v. U. S., 280 F. 2d 414.

In Eisenberg v. Smith, 263 F. 2d 827, 829, the request to charge was, "On the basis of the evidence and the applicable law, you are directed to find a verdict for the plaintiffs." The Court held:

> "This request, thrown in along with a considerable list of points for charge, is not, we think, a compliance with the rule as stated in Section 50 (a) and quoted above. It certainly gives the trial judge no

hint of what the position of the party making the motion is except that he wants the lawsuit decided in his favor. The purpose of the rule requiring the stating of grounds is, of course, to let the trial judge and opposing counsel see what the problem is so that the decision will be the best that can be had. 5 Moore Federal Practice, § 50.04, p. 2321 (2d Ed. 1951); Virginia Carolina Tie & Wood Co., Inc. v. Dunbar, 4 Cir., 1939, 106 F. 2d 383, 385; Ryan Distributing Corp. v. Caley, 3 Cir. 1945, 147 F. 2d 138, 140."

Petitioner said in his motion for directed verdict (R. 104):

"The evidence in this case conclusively establishes and proves the allegations contained in Plaintiff's Complaint."

But which of the inconsistent, alternative, and vital allegations of combination was conclusively proved? Which did the trial court err in not having found, as a matter of law? Was it that defendant combined with plaintiff's customers, but not with Milne Circulation Sales, Inc., nor with George Kroner? With a, but not with b, c, ab, ac, bc or abc? With b, but not with a, c, ab, ac, bc or abc? With c, but not with the others? With ab alone? ac? bc? abc?

Neither in his motion (R. 103) nor in his argument on his motion (R. 104) did petitioner state which of the many alternatively pleaded combinations he thought he had proved as a matter of law.

Thus the ground of the motion for directed verdict is not only in default of the mandatory requirement of the rule, it is patently, manifestly false. One cannot prove, by the same evidence, and establish conclusively, all of seven mutually contradictory ultimate facts.

A Court's determination of a fact, as a matter of law, requires that there be only one possible finding of fact under the pleading and proof. Such cases exist, but this is not one of them. Neither in the trial court nor in the Court of Appeals, nor even at the end of the road in this Court, does petitioner assert which, of the alternative combinations he pleaded, he thinks he proved as a matter of law, and which he claims the trial court should have declared to exist as a matter of law.

Irrespective of his proof, and irrespective of the state of anti-trust law, petitioner was not, under his pleadings, entitled to a directed verdict on either theory advanced in this Court, viz., that there was, as a matter of law, a Sherman Act combination between respondent and petitioner; or that there was, as a matter of law, a Sherman Act combination between respondent and "plaintiff's customers and/or Milne Circulation Sales, Inc., and/or George Kroner."

The "Question Presented" is therefore not before the Court on this record and the writ should be dismissed as having been improvidently granted. Tyrrell v. District of Columbia, 243 U. S. 1.

III.

The Record Does Not Show a Violation of the Act as a Matter of Law.

At the outset we must recall that the ultimate question of whether respondent was party to a combination *vel non* was tried out with care and deliberation before a jury, and that the jury found that there was no such combination proved. We must also remark again that the only question raised here is petitioner's right to a judgment in spite of the jury verdict. In this court, no error of procedure or instructions is raised, because the Question Presented by petitioner's brief does not fairly comprise

therein anything but the right to his claimed judgment, Rule 40.1 (d) (1); nor does the relief he requests under Rule 40.1 (h), i. e., a judgment n. o. v. (Br. 32), by any interpretation, contemplate a remand for a new trial,—the only remedy for a procedural error.

In this situation the limitation of this court's function is that stated by this court in Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 35, 64 S. Ct. 409, 412:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

With this rule of law before us, we must examine whether the only reasonable conclusion to be drawn from the record made below is such that a judgment for petitioner is required. Let us turn now to the question.

Petitioner concedes, under the rule of U. S. v. Colgate, 250 U. S. 300, that if the respondent had announced a retail price at which its papers must be sold "and then declines to sell to those who fail to adhere to the policy, he has not put together a combination in violation of the anti-trust laws" (Br. 21). But petitioner bases his argument for not applying the rule of Colgate here upon the sentence of the opinion in U. S. v. Parke, Davis & Co., 362 U. S. 29, 44, 80 S. Ct. 503, 512:

> "When the manufacturer's actions, as here, go beyond mere announcement of his policy, and the simple refusal to deal, and he employs other means which affect adherence to his retail prices, this countervailing consideration is not present, and therefore he has put together a combination in violation of the Sherman Act."

Unlike Parke, Davis, respondent in this case did not go beyond a simple refusal to deal.

The concept of "going beyond" necessitates the possibility of "stopping short of". We think the record shows plainly that the actions of respondent, whether or not considered as a part of a combination, did not "go beyond", but "stopped short of" a simple refusal to deal. As the Court of Appeals put it:

> "At this juncture, Globe-Democrat had not gone so far as to decline to sell" (R. 156.)

In this relationship plaintiff enjoyed an exclusive territory, so long as he observed the suggested maximum price (R. 39, 57, 58). This was not the case in Parke, Davis or Lessig, or Osborn.*

Plaintiff had paid the previous carrier for this route *eleven thousand dollars,* and had mortgaged his home to buy it (R. 22). He had had only an eighth grade education, and had had only milk route, bread route, odd job and farm work experience (R. 21).

In the case of Albrecht and the Globe-Democrat a "simple refusal to deal" would not have been so simple. It would have been, for Albrecht, catastrophic: a total wipe-out, with his $11,000 investment gone with the wind. One can hardly coerce a hold-up victim any harder than by shooting him dead before robbing his pocket. Petitioner says this course would have been legally open to the respondent (Br. 21).

Instead, respondent competed with him by selling in his territory at the suggested retail price, *and continued to*

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* United States v. Parke, Davis & Co. (1960), 362 U. S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505; Lessig v. Tidewater Oil Co., (C. A. 9, 1964), 327 F. 2d 459, cert. den. 377 U. S. 993, 84 S. Ct. 1920, 12 L. Ed. 1046; Osborn v. Sinclair Refining Co. (C. A. 4, 1963), 324 F. 2d 566; Osborn v. Sinclair Refining Co. (C. A. 4, 1960), 286 F. 2d 832.

sell to Albrecht at wholesale the newspapers with which he maintained his trade.

Even after Albrecht brought his treble damage suit, as a result of which the Globe-Democrat did at last unilaterally refuse to deal (R. 48, 148), the respondent *even then* gave Albrecht sixty days to sell his route (R. 48) and, at his request, an additional extension of ten days (R. 49), so that he was able to sell his route, at a profit, for twelve thousand dollars (R. 71).

To argue that a jury *had to* find that such conduct was *going beyond* a simple refusal to deal rather than *stopping short of* a simple refusal to deal is simply to ignore the facts of commercial life and of the contexts of the cases petitioner relies upon.

Petitioner's position in this Court is twofold: A. That he did prove a combination including a "common purpose" between respondent and "plaintiff's customers and/or Milne Circulation Sales, Inc., and/or George Kroner" as a matter of law (Br. 1, II); and B. That no showing of common purpose is necessary under the law because a combination existed between respondent and Albrecht as a matter of law. Br. III, IV, V.

Neither position is properly before this Court; because position A is by no means "fairly comprised" in the question Presented, and position B was not fairly comprised in the complaint on which the case was tried in the District Court. Further, neither position is borne out by the facts or the law.

A. Petitioner's Brief, Sections I and II.

According to the complaint, as amended following completion of the evidence, the persons defendant (respondent) was alleged to have combined with were (R. 110, 111):

> "... plaintiff's customers and/or Milne Circulation Sales, Inc. and/or George Kroner."

This is what the complaint alleged at the time the motions for directed verdict and for judgment n. o. v. (the only basis for reversal urged in this Court) were submitted and ruled on (R. 142).

This Court declared in U. S. v. Parke, Davis & Co., 362 U. S. 29, 44, 80 S. Ct. 503, 512:

> "The Sherman Act forbids *combinations of traders* to suppress competition."

The prohibited combinations are combinations, as the Court says of *traders*. Not, that is, of employer and employee, master and servant, nor of seller and consumer, but of two or more *traders*.

The first alternative co-combinee alleged is "plaintiff's customers".

A consumer-customer is by definition not a trader. Petitioner has not cited a single case in support of his position in which a Sherman Act combination was held to exist between a seller and an ultimate consumer. We have found no such case, nor any case, than this, in which such an assertion was made.

The second alleged co-combinee was "and/or Milne Circulation Sales, Inc." This was an independent contractor employed generally by respondent to solicit subscriptions to its newspaper by two means, telephone and door-to-door (R. 64).

On May 20, 1964, respondent announced to Albrecht that it would begin to compete with him (R. 8) and enclosed a solicitation letter which was to be sent to every resident of his territory (R. 9). Two days later, on May 23, 1964 (R. 91), Milne Circulation Sales, Inc. commenced soliciting residents in Albrecht's territory on the telephone by means of a reversed directory. Milne was given explicit instructions by respondent as to what to say (R. 65). After the telephone solicitation, some boys were hired at the

direction of respondent to do door-to-door solicitation (R. 69-70). Since a corporation cannot act except through a human agency, the trial court excluded, without objection of petitioner, the possibility of a combination of a corporation with any of its agents or employees (R. 122-123). Milne, under the petitioner's own evidence, was merely an agent. It was in no sense a trader.

In the case of Albrecht's customers, if the person solicited was paying more than the suggested retail price, Milne would assure him he could have the Globe-Democrat delivered at the regular price. If the customer was willing, Milne made out an order form and sent it to the respondent (R. 68). This was all. Milne's manager, McDowell, was plaintiff's witness, and his testimony was uncontradicted. Milne merely conveyed respondent's message for a fee, as any employee could have done.

It is as far a fetch to claim that respondent combined with Milne, in the Sherman Act sense, as it would be to claim such a combination with the United States Post Office Department, because for a fee it carried respondent's mailed solicitations.

Neither Milne nor the Post Office was a trader.

Lastly, petitioner asserted a combination with "and/or George Kroner". George Kroner, alone of the alleged co-combinees, was a trader in newspapers.

But there was no evidence of an agreement with Kroner, and utterly no evidence that anything that Kroner did had anything to do with petitioner's asserted damage. Kroner, called as petitioner's witness, testified that he answered respondent's advertisement and took over delivery to the 314 daily and 260 week-end subscribers (R. 73). He never solicited any persons to become his customers on this route (R. 79). He had previously been a Globe-Democrat carrier (R. 72) and had only a verbal understanding with them "That I was to handle that the

same as I did Route 48. I was to pay my bills weekly and bill the customers according to the prescribed rate" (R. 74). At this time he was not told the prescribed rate; as he already knew it (R. 74). He had previously been told that the Globe-Democrat would not tolerate overcharging the customers (R. 75).

This was no more than the unilateral declaration of unilateral policy permitted by the Colgate rule, and knowing the policy Kroner took on the new route and customers.* Kroner was petitioner's witness, not respondent's, and on direct examination he categorically denied soliciting any customers of Albrecht (R. 79).

Now the charge urged by petitioner below (Plaintiff's Requested Instruction No. 16, R. 113) requires that the combination be one beginning "on or about May 20, 1964". Kroner, a witness called by petitioner, had nothing to do with the matter until July, when he saw the respondent's advertisement in the newspaper (R. 75). Thereafter, all he did was to deliver to the customers on the list given him by the Globe-Democrat, at the regular subscriber's rate, from the middle of July, 1964 (R. 78) until December, 1964 (R. 80), when he sold this route to Schwarzenbach (R. 80), who had bought Albrecht's route the previous September 25 (R. 51, 52).

There is no evidence whatever that Kroner ever combined in any way with respondent. He acquired the customers from it *after* respondent had obtained them by price and service competition. And he was not shown to have had anything whatever to do either with the customer

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* Petitioner concedes that there was no policing or other coertion of Kroner or of any other carrier. In his Court of Appeals brief, p. 9, petitioner said: "Other than in the case of Plaintiff, the Publisher has taken no other steps to enforce maintenance of the suggested retail price, except to contact carriers, whose subscribers have called to the Publisher's attention the fact that carriers were not charging defendant's suggested price, and then the Publisher requested them to do so."

solicitation or with Albrecht's termination by respondent in November, 1964, which was the subject matter of the Supplemental Complaint. But these two actions—solicitation and termination—are the only actions for which petitioner seeks recovery here:

> "Plaintiff respectfully prays . . . . a trial be had on the amount of damages resulting from *the unlawful solicitation,* and *the unlawful termination*" (Br. 32).

B. Petitioner's Brief, Sections III, IV, V.

Finally, we turn to petitioner's unpleaded proposition that an anti-trust violation can consist of coercion of a buyer by a seller "not acting in agreement, concert, or common purpose with anyone", Br. 13. For reasons we have already stated (Point IIA, supra), we feel this proposition is not presented by this record. For reasons we shall now state, we feel this proposition is entirely without supporting authority.

The statute, for violation of which this action was brought (Br. 2), reads (15 U. S. C. A. 1):

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal."

Under normal rules of statutory construction, the word "combination" must take coloring from its companions "contract" and "conspiracy". Thus since "contract" and "conspiracy" require a meeting of human minds, the word "combination", having been uttered by Congress in the intimate context of these two words, will, under the rule of *noscitur a sociis,* be construed in this sense, too; rather than in, say, the proximate cause sense, where a "combination" might exist between a person, and a beast, an inanimate object, or an Act of God. 82 C. J. S., Statutes, § 331.

The same rules of construction require that interpretative effect be given to the modifying phrase "in the form of trust or otherwise". Not all combinations are proscribed by the act,—only those "in the form of trust or otherwise". The word "otherwise" cannot be construed to vitiate the modifying effect of the whole phrase without casting out as meaningless an entire phrase which Congress deliberately inserted, intending that it convey some meaning, 82 C. J. S., Statutes, p. 712 et seq. The normal and the only reconciling meaning possible for the word "otherwise" is so as to include combinations *ejusdem generis*, i. e., *like those* "in the form of trust", as the word "trust" was used in the discussion of trade or commerce at the end of the nineteenth century. 82 C. J. S. Statutes, p. 332 b. And an "otherwise combination" could scarcely be *like* a "combination in the form of trust", unless it had, as an irreducible minimum, at its core, a meeting of the minds of persons engaged in trade with respect to the same commodity or service.

Applied to this statute the rule of *nosictur a sociis* requires, to fall within the prohibition, that one person have some sort of meeting of the minds with another, i. e., some sort of "common purpose". This is the lowest common denominator of the three correlatives. The Courts have used various synonyms to indicate prohibited agreements of greater or lesser formality, but these quasi-synonyms all are referrable back to the statute in terms of this least common denominator. "Agreement": Simpson v. Union Oil Co., 377 U. S. 13, 24, 84 S. Ct. 1051, 1058. "Arrangements": Lessig v. Tidewater Oil, 327 F. 2d 467; and Osborn v. Sinclair Oil, 324 F. 2d 566, 573. "Entwining", "Wholesalers' participation", "Willingness to go along", "Acquiescences", "Abide by", "substantial unanimity", "Concerted Action", etc., U. S. v. Parke, Davis, 362 U. S., l. c. 37, 45, 46, 47, 80 S. Ct., l. c. 508, 512, 513.

But to date no decision of any court of which we are aware has dispensed with the minimal requirement of the statute that there must be some sort of meeting of human minds to effect a prohibited restraint of trade. Of all the synonyms for "contract, combination . . . or conspiracy" which the lexicographers authorize, it seems to us the broadest and mildest,—the most informal expressible—is the "common purpose" employed in the charge in this case.

This is the way the trial court put it (R. 126):

> "A combination is a concerted course of action between the defendant and one or more persons. This may be with an agreement either expressed or implied or it may be without an agreement. In order to have a combination there must be a common purpose either to accomplish an unlawful act by lawful means or to accomplish a lawful act by unlawful means."

This is really no different from petitioner's own theory and requested submission at the trial. While he objected, almost offhandedly, to the use of the phrase "a common purpose" (R. 112), the legal effect of his offered instructions was the same.

In the instructions he submitted appear the following findings:*

> No. 16 (R. 114): "the pressure resulting from the fact that the Defendant and Kroner, *by concerted action,* were preventing the Plaintiff . . ."

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* "Concert of Action" in appellant's phraseology is synonymous with the phrase "common purpose". (App. Br. in Ct. of App.):

App. Br. 48. ". . . common purpose or concert of action is not and cannot be a necessary element . . ."

App. Br. 51. ". . . Tidewater and Lessig did not have any element of concert of action or common purpose . . ."

App. Br. 51. ". . . 'combination' under Section 1 of the Sherman Act can arise without any element of common purpose or concert of action . . ."

App. Br. 56. ". . . regardless of whether any common purpose or concert of action, agreement or conspiracy existed . . ."

No. 17 (R. 115): "if you find that the Defendant was able to withhold these customers and new starts from the purchaser of Plaintiff's Route only because of the *combination or concerted action* with Kroner, Plaintiff's Customers and Milne Circulation Sales, Inc. . . ."

No. 18 (R. 116): "If you find that the Defendant did violate Section I of the Sherman Act by entwining Milne Circulation Sales, Inc., the customers of the Plaintiff and Kroner *in a combination or concert of actions* . . ."

Thus petitioner's own offered submission required the same finding of an understanding, concerted action or common purpose, which he now claims it would be evil to require and would result in the destruction of the competitive system (Br. 30).

The interpretation of the statute thus given by the Court below is no different from that given by the petitioner himself and the authorities. The idea of a single-handed combination is an inherent paradox. The concept is a contradiction in terms—a *felo de se.*

The only things which are declared illegal by Section 1 of the Sherman Act are contracts, combinations or conspiracies in restraint of trade. Economic coercion as such is not referred to in the statute. To be illegal the "coercion" must take the form of a contract, combination or conspiracy. In the first Osborn case (286 F. 2d 832, 839, cert. den. 366 U. S. 962), the Court, relying on Colgate, noted that:

"Even where a manufacturer or supplier has a policy aimed at a result which, if accomplished through an agreement or combination would amount to an unreasonable per se restraint of trade, he nevertheless may, in the absence of such agreement or

> combination, refuse to deal with a purchaser in accordance with the announced policy."

This position was reiterated most recently in Amplex of Maryland, Inc. v. Outboard Marine Corp., 4th Cir., CCH 1967, Trade Cases, § 72135, ... F. 2d ....

There is nothing in Parke, Davis or any of the other cases cited at pages 22 and 23 of petitioner's brief which detracts from the continued validity of this statement.

Petitioner bases his argument that an unlawful combination can arise, although having no other participants than the manufacturer and the "coerced" dealer, upon the following statement from Parke, Davis:

> "When the manufacturer's actions, *as here,* go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, this countervailing consideration is not present and therefore he has put together a combination in violation of the Sherman Act" (Emphasis added).

The above statement, however, may not be taken out of context. The key words are "as here". The facts of Parke, Davis disclose that the decision turned on the existence of an unlawful combination between Parke, Davis and its wholesalers to force the retailers to comply with the suggested retail prices. Indeed, the majority opinion expressly states that this was the basis for the decision. Thus, the Court stated:

> "In thus involving the wholesalers to stop the flow of Parke Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, *Parke Davis created a combination with the retailers and the wholesalers to maintain retail prices* and violated the Sherman Act. Although Parke Davis' originally announced wholesaler's policy would not under Colgate have violated the Sherman Act if its

> action thereunder was the simple refusal without more to deal with wholesalers who did not observe the wholesalers' Net Price Selling Schedule, that entire policy was tainted with the 'vice of . . . illegality,' cf. United States v. Bausch & Lomb Optical Co., 321 U. S. 707, 724, when Parke Davis used it as the vehicle *to gain the wholesalers' participation in the program to effectuate the retailers' adherence* to the suggested retail prices."

Osborn, Lessig and Englander Motors, all cited on page 23 of petitioner's brief, each involve an illegal contract or agreement. George W. Warner & Co. involved merely the sufficiency of the plaintiff's pleadings; it was not a decision on the merits.

Simpson v. Union Oil Co., discussed at pages 28 and 29 of petitioner's brief, best illustrates the point that more than mere economic "coercion" must be shown in order to establish a Section 1 violation. There must be a showing of either a contract, combination or conspiracy. In Simpson there was no showing of combination or conspiracy. The violation was found to be the *unlawful agreement* which was "coercively employed". Absent the agreement, there would have been no violation. The Court makes this clear, for the majority opinion notes in two places (377 U. S., p. 17 and p. 24) that there was an agreement which was "used coercively". The Court said:

> "Hence on the issue of retail price maintenance under the Sherman Act there is nothing left to try, *for there was an agreement for resale price maintenance*, coercively employed."

But we have shown that petitioner conceded that no such agreement as *Simpson* condemns existed in this case as to "plaintiff's customers and/or Milne Circulation Sales, Inc. and/or George Kroner" (R. 144).

And the petitioner himself said out of his own mouth (R. 61):

> "Never had I agreed to that statement of policy. I had to deliver newspapers because of my investment, but never had I agreed to that statement of policy. Being an independent merchant I have the right to set my prices."

Therefore, even if we were to ignore the requirements of the Constitution, and even if we were to ignore the record of petitioner's pleadings and submission in the trial court, unless Colgate is to be overruled and the statute revised, petitioner simply did not, as the Court of Appeals held, produce any evidence upon which to predicate a finding of "combination in the form of trust or otherwise". And by no stretch of justice is he entitled to a judgment in derogation of the jury's finding that no such combination existed.

The writ should be dismissed.

Respectfully submitted,

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